IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7095 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MG CHAUDHARY

Versus

SECRETARY

Appearance:

1. Special Civil Application No. 7095 of 1993

MR DS VASAVADA for Petitioner No. 1

..... for Petitioner No. 2

MR MD PANDYA for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 24/02/2004

ORAL JUDGEMENT

This petition is filed under Article 226 of tshe

Constitution of India, challenging the action of the respondent Board in denying the placement of higher grade on the post of Executive Engineer to the petitioner No.1 with effect from 30th July, 1975 and instead thereof placing him in the higher grade with effect from 1.4.1978. The petitioners have also sought for the direction to the respondent Board to grant higher grade of Executive Engineer to the petitioner No.1 with effect from 30th July, 1975 with all consequential benefits and to pay difference along with interest at the rate of 15% per annum.

2. It is the case of the petitioner No.1 that he joined in the service of the respondent Board as Deputy Engineer with effect from 30th July, 1966. The petitioner was granted higher grade in pursuance of GSO 253 with effect from 1.4.1978. The petitioner has been absorbed as Executive Engineer with effect from 8.5.1982. It is stated in the petition that the petitioner was entitled for being placed on the higher grade with effect from 30th July, 1975. However, the respondent Board has not placed the petitioner on the higher grade with effect from the due date i.e. 30th July, 1975.

3. It appears that the placement on higher grade was denied to the petitioner only on the ground that there was only one adverse remark in the confidential report of the petitioner during the entire service span of 22 years and that this adverse remark was inserted in the confidential report only for the year 1969-70.

4. The petitioner further stated that he was issued charge-sheet on 1st November, 1973 and 4th October, 1974. The charges which were levelled against the petitioner were not of serious nature and it was just alleged that petitioner was negligent in duty. It is further stated that by an order dated 3rd June, 1976, the petitioner was punished in the form of with-holding one increment without cumulative effect. With regard to second charge-sheet, the petitioner was only issued memo. Hence the petitioner has claimed that the punishment order issued in the year 1976 and 1978 could not have been the basis for not granting the higher grade with effect from 30th July, 1975.

5. It has been further stated that there are several identical cases in which Engineers have been inflicted more severe punishment than the petitioner and despite that such Engineers have been placed on higher grade. The petitioner has annexed entire list covering as many as 41 cases, wherein the persons whose names were

mentioned therein were placed on higher grade with effect from the due date.

6. The petitioners have also referred to number of petitions which were filed before this Court, wherein certain guidelines were issued by this Court directing the respondent Board that while evaluating the performance of the Engineers their overall performance in the entire period should be taken into consideration by the authorities of the respondent Board.

7. Mr. D.S Vasavada, learned Advocate appearing for the petitioners submitted that after the pronouncement of judgement by this Hon'ble Court in Special Civil Application No. 530 of 1981 and other cognate matters, the respondent Board has extended the benefit of the said judgement to many Engineers, however, the said benefit was not given to the petitioner No.1 and hence, the present petition is filed before this Court. He has further submitted that there is no justification on the part of the respondent Board to deny the said benefit to the petitioner. The petitioner has fulfilled all the requisite criteria for the purpose of availing of the higher grade on completion of 9 years and though the petitioner No.1 was entitled to the said higher grade in year 1975, the same was given to the petitioner only in the year 1978. The petitioner was therefore denied the benefits, which flows therefrom and as a result thereof, all future prospects of the petitioner No.1 were also adversely affected. Mr. Vasavada has further relied on the decision of this Court (Coram: S.K. Keshote, J.) in Special Civil Application No. 977 of 1988, wherein this Court has held that taking into consideration the totality of the facts of the case coupled with the fact that the adverse remarks for the year 1974-75 have been communicated after more than four years, the decision taken to deny the benefit of higher grade to the petitioner with effect from 3.5.1975 was wholly arbitrary and unjustified and it cannot be allowed to stand. The Court has further declared that the decision of the Board not to grant higher grade benefit to the petitioner with effect from 3.5.1975 was arbitrary, unjustified and hence, the Court held that the petitioner was entitled to consequential benefits which flowed therefrom.

8. Based on the said judgement, Mr. Vasavada has submitted that the adverse remarks which were made against the petitioner were not of serious nature, and it was not the case of the respondent that the petitioner's integrity was doubtful. He has, therefore, submitted that the petitioner should have been granted the

alternative higher grade on its due date, rather than delaying the same by three years.

9. Mr. M.D. Pandya, learned Sr. Counsel appearing for the respondent Board submitted that as per the terms and conditions of GSO 253 dated 26.12.1973, the benefit of 9 years Rule had become operative with effect from 1.8.1972. He has further submitted that there was some dispute with regard to the interpretation of grant of higher grade etc. to the categories of junior Engineer/Deputy Engineer and hence, on 7.3.1980, a settlement was entered into by the Board with the DETA Association representing the Engineers and in pursuance of this settlement, Establishment Circular No.312 dated 30.4.1980 was issued by which the procedure and principle of absorption of Higher Grade Engineers was enumerated. As per the provisions contained in the said Circular, if a senior employee due to some fortuitous causes like (a) delay in relief, (b) distance of new station and new posting, (c) leave taken at the time etc. takes charge of the new posting at a later date than his junior, then the senior employee shall be considered for absorption on the basis of his inter-se seniority in the lower cadre. It was further provided in the said Circular that the fortuitous benefit of grant of 9 Year Rule from an earlier date to a junior employee as per seniority list would be ignored, provided that the postponement of nine year benefit to the senior persons not being a deliberate decision of the competent authority. The deliberate decision of the competent authority can be due to the reasons mentioned at clause (iii) of the GSO which restricts the Engineer to get Higher Grade from the date demanded by him because of punishment awarded. The said clause takes care of only two punishments i.e. continuance in the same category as a measure of disciplinary action and reversion. There were also certain cases of Engineers who were given punishment and cases where after the punishment period was over they were reverted. Since this issue was not clear about cases in which the punishment was awarded other than those mentioned above in the said clause, the issue was raised by one Engineer in Special Civil Application No. 1974 of 1984 before this Court and practice followed by the Board was approved and certain principles were laid down. It inter-alia includes:-

1. When the record is otherwise clear and the person has been given only one warning as a result of departmental inquiry during the nine year benefit period and the charges are not grave, the postponement of nine year benefit should be done

only for 3 months from the due date.

2. In the above type of cases, if the charges are grave resulting in warning, then the postponement should be for 6 months.

3. In case where the record is otherwise clear but the person has been chargesheeted more than once during the nine year period resulting in only warnings and the charges are not grave, the postponement of the nine year benefit be for six months from the due date.

4. The cases similar to (3) above but where the charges are grave should be decided regarding postponement of the nine year benefit depending on the gravity of the case.

10. Mr. Pandya has further submitted that the other decision of the Board in deferring higher grade was taken when the overall performance of the Engineer was not found to be fit even for promotion. The performance of an Engineer is being gauged by the confidential report filled by respective superior of an Engineer. He has further submitted that only when continuous nine confidential reports of an Engineer are clear, then only he is eligible for benefit under nine year rule. Mr. Pandya has further submitted that on the basis of GSO 253, read with establishment Circular 312 and the principle laid down by this Court in Special Civil Application No. 530 of 1981, a common seniority list was prepared of all the Deputy Engineers drawing higher grade and was circulated by letter dated 16th September, 1985. The Deputy Engineers whose names were mentioned in the said seniority list were absorbed as per seniority and others were shown in the seniority at the respective serial numbers. Mr. Pandya has further submitted that the remaining Engineers who were not in the seniority list have either been absorbed prior to the issuance of seniority list or they were junior to the last person shown in the seniority list. He therefore submitted that if the petitioner along with the remaining Engineers are given the benefit as demanded by them in the present petition, then the decision of this Court would not only be affecting the present Engineers, but also the Engineers mentioned in the seniority list who have been found fit for higher grade and also their over all performance was better than the present petitioner who has filed this petition. He has therefore submitted that the petitioners' request for 9 year higher grade with effect from earlier date should not be acceded to in this

petition and the petition be dismissed accordingly.

11. After having heard the learned Advocate appearing for the respective parties and after going through the contents raised by them in the respective pleadings and after considering the provisions contained in GSO 352, Establishment Circular No. 312 and earlier orders passed by this Court in similar such matters, the Court is of the view that the petitioner is not entitled to the relief claimed in this petition, for grant of the alternative higher grade of Executive Engineer with effect from 30th July, 1975 with all consequential benefits, as against the date of 1.4.1978, on which the same was granted to the petitioner. As far as the petitioner is concerned, he has completed 9 years on 29.7.1975. However, during the year 1969-70, an adverse remark was made in the confidential report of the petitioner. The said adverse remark was to the effect that the petitioner was required to learn much in handling the staff. The said adverse remark was communicated to the petitioner on 24.6.1970. Thereafter, disciplinary action was also taken against the petitioner and first charge-sheet was issued on the petitioner on 1.11.1973 and as a result of the said charge-sheet and enquiry, ultimately one increment was with-held without cumulative effect by an order dated 3.6.1976. The petitioner was also issued another charge-sheet on 4.10.1974, whereby warning memo was issued on 18.5.78 in respect of the charges of 1972-73. It has also come on record that for the year 1967-68, an adverse remark was made against the petitioner to the effect that he was not very accurate to his reports. Again for the year 1968-69, an adverse remark was made to the effect that the petitioner though not required, remained on different types of leave.

12. As per the principles laid down by this Court in Special Civil Application No.538 of 1981, for promotion to the next higher grade/post the criteria was that the overall performance of the person concerned should be required to be taken into consideration. For the purpose of giving 9 years benefit, the performance of all the 9 years prior to due date of consideration to higher grade was also required to be taken into consideration.

13. The respondent Board has taken into consideration the overall performance of the petitioner, and looking to the earlier adverse remarks as well as pending departmental proceedings on the due date of considering the petitioner's claim for higher grade, the Board has rightly come to the conclusion that the petitioner did

not deserve higher grade on the due date i.e. from 30.7.1975. The Court does not find any infirmity in the decision making process of the respondent Board and when the petitioner's service record is not matched with the criteria laid down for giving the higher grade benefit of 9 years, this Court does not think it fit and proper to exercise its extraordinary prerogative, plenary and discretionary jurisdiction under Article 226 of the Constitution of India and to interfere with the decision taken by the respondent Board. The petition is therefore, dismissed. Rule is discharged without any order as to costs.

(K.A. Puj, J.)

*/Mohandas